Cosway (M) Sdn Bhd & Anor v Gan Poh Im

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–19 OF 1996
ZALEHA ZAHARI J
9 AUGUST 2000

Civil Procedure *— Appeal — Memorandum of — Mode and time frame for filing of memorandum of appeal after full trialin subordinate court — Filing of memorandum of appeal six months after Form 141 notice was served — Whether court may extend time — Rules of the High Court 1980 O 55 r 2(1)*

The appellants by a notice of motion applied for an order that they be granted an extension of time to file and serve the memorandum of appeal pursuant to O 3 r 5 of the Rules of the High Court 1980 ('the RHC'). The issue for determination related to the procedure as to the mode and time frame for an appellant to file the memorandum of appeal in respect of a decision of a sessions court judge given after a full trial.

Held, dismissing the application:

(1) There were no conflicting provisions in the RHC and the Subordinate Courts Rules 1980 ('the SCR') as to the mode and the time frame for the filing of a memorandum of appeal after a full trial. The confusion that exists is confined only to interlocutory appeals (see p 522C, E).

(2) The mode and time frame for the filing of a memorandum of appeal after a full trial is governed by O 55 r 2 and r 4(3) of the RHC which provide that a memorandum of appeal after a full trial is to be filed within 14 days of the receipt of the Form 141 notice. The appellant in filing the memorandum of appeal six months after Form 141 was served was well out of the time frame prescribed by the rules (see pp 521I, 522C–D).

(3) The amended O 55 r 2(1) of the RHC has removed the enabling power of the court to extend time, thus the time frame of 14 days prescribed is mandatory and must be strictly complied with. As it is necessary to show special circumstances to enable the court to exercise its discretion to enlarge time, ignorance of the procedural law and showing that the appeal had merits are not enough (see p 523C–E).

[Bahasa Malaysia summary

Perayu-perayu melalui suatu notis usul memohon untuk suatu perintah bahawa mereka diberikan perlanjutan masa untuk memfail dan menyampaikan memorandum rayuan menurut A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KKMT tersebut'). Isu yang perlu ditentukan berkaitan prosedur berhubung cara dan tempoh masa untuk seorang perayu memfailkan memorandum rayuan berkenaan

suatu keputusan yang telah diberilan oleh seorang hakim mahkamah sesyen setelah perbicaraan penuh selesai. A

Diputuskan, menolak permohonan tersebut:

(1) Tiada apa-apa percanggahan di dalam peruntukan KKMT dan Kaedah-kaeadah Mahkamah Rendah 1980 ('KKMR tersebut') berkenaan dengan cara dan tempoh masa untuk pemfailan memorandum rayuan selepas suatu perbicaraan penuh. Kekeliruan yang timbul hanya berkenaan dengan rayuan interlokutori (lihat ms 522C, E). B

(2) Cara dan tempoh masa untuk pemfailan suatu memorandum rayuan selepas suatu perbicaraan penuh adalah diliputi oleh A 55 k 2 dan k 4(3) KKMT yang memperuntukkan bahawa suatu memorandum rayuan selepas suatu perbicaraan penuh perlu difailkan di dalam masa 14 hari dari penerimaan notis Borang 141. Perayu di dalam memfailkan memorandum rayuan enam bulan selepas Borang 141 telah disampaikan jauh melampaui tempoh masa yang diperuntukkan oleh kaedah-kaedah (lihat ms 521I, 522C–D). C D

(3) Aturan 55 k 2(1) KKMT yang telah dipinda telah mengeluarkan kuasa mahkamah untuk melanjutkan masa, dengan itu tempoh masa 14 hari yang diperuntukkan adalah mandatori dan mestilah dipatuhi secara ketat. Oleh kerana adalah perlu untuk menunjukkan keadaan-keadaan khas untuk membolehkan mahkamah untuk melaksanakan budi bicara untuk melanjutkan masa, kejahilan undang-undang prosedur dan menunjukkan yang rayuan mempunyai merit-merit adalah tidak mencukupi (lihat ms 523C-E).] E F

Notes

For cases on memorandum of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 733–738.

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Cases referred to

Cheah Teong Tat v Ho Gee Seng & Ors [1974] 1 MLJ 31 (refd)
Gan Hay Chong v Siow Kian Yuh & Anor [1975] 2 MLJ 109 (refd)
Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd [1990] 2 MLJ 170 (refd)
Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd [1999] 1 CLJ 337 (refd) H
Manickam v Tremelbye (Selangor) Rubber Co Ltd [1949] MLJ 90 (refd)
Miranda v Khoo Yew Boon [1968] 1 MLJ 161 (refd)
Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors [1991] 3 CLJ 2217 (refd)
Siang Galau v Ang Wak Hiong [1994] 1 MLJ 42 (refd) I
Yupaporn Seangarthit v Neil Allan Campbell Webb [1995] 3 MLJ 705 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 5, O 55 rr 2, (1), (2), 4(3)
Subordinate Courts Rules 1980 O 49 rr 2(3), 2(4), 3A, 6, Form 141

Appeal from: Summons No 53–489 of 1996 (Sessions Court, Pulau Pinang)

R Thayalan (*Chew Sien Chee & Co*) for the appellant.
N Shanmugam (*Shan & Gooi*) for the respondent.

Zaleha Zahari J: By notice of motion dated 25 May 1999 the applicants/appellants sought for, inter alia, an order that they be granted an extension of time from 23 April 1998 to 21 May 1998 and/or 8 October 1998 to file and serve the memorandum of appeal dated 18 May 1999 pursuant to O 3 r 5 of the Rules of High Court 1980 ('RHC'). The application is supported by the affidavit of Chiew Sien Chee, counsel for the appellants/defendants, affirmed on 25 May 1999.

The issue for determination relates to the procedure as to the mode and time frame for an appellant to file the memorandum of appeal in respect of a decision of a sessions court judge given after a full trial. Before dealing with grounds and submission of counsel it is necessary to set down the chronological sequence of events which are not in issue.

On 18 February 1998 the sessions court judge, after a full trial, delivered her decision in respect of the suit which is the subject matter of appeal. Five days after the delivery of the sessions court decision, ie on 23 February 1998, the appellants filed their notice of appeal dated 19 February 1998 pursuant to O 49 r 2(3) of the Subordinate Courts Rules 1980 ('SCR'). Thereafter, on 9 April 1998, pursuant to O 49 r 2(4) of the SCR the sessions court issued and served the Form 141 notice on the appellants' counsel, followed by the filing of an appeal record on 21 May 1998 (incorporating into it a memorandum of appeal dated 18 May 1998) by the appellants' counsel, which record was served on the respondent's counsel on the same date of its filing, ie 21 May 1998. It is an admitted fact that by reason of the memorandum of appeal being incorporated into the record of appeal filed on 21 May 1998, the prescribed filing fee for a memorandum of appeal was not paid by the appellants. Subsequently, about five and a half months later on 8 October 1998, the appellants' counsel filed a separate memorandum of appeal, ie encl 8, which was in the same terms as the memorandum of appeal dated 18 May 1998 incorporated into the appeal record filed on 21 May 1998 upon which the appellants paid the prescribed filing fee for the filing of a memorandum of appeal.

Three days prior to the hearing date of this appeal on 17 December 1998, the respondent's counsel, vide notice issued on 14 December 1998, gave notice to the appellants' counsel of their intention to raise a preliminary objection that the appellants had filed and served their memorandum of appeal out of time. The appellants' counsel filed this notice of motion for extension of time to file in their memorandum of appeal on 25 May 1999, ie five months after receipt of the notice of the respondent's counsel intention to raise the preliminary objection.

Thus, there were therefore two memorandums of appeal before this court. The first, that incorporated into the record of appeal filed by the appellants on 21 May 1998 upon which no filing fee has been paid. The second, that filed separately on 8 October 1998 (encl 8), upon which the appellants paid the prescribed filing fee. If one were to compute time from the service of the Form 141 notice by the court in this case, ie 9 April 1998, the first memorandum of appeal was filed within six weeks of the receipt of the Form 141 notice, whilst in the case of the second memorandum of appeal, there was a lapse of about six months.

The reason for this situation and the explanation as to why this application for extension of time was filed given by counsel for the appellants are as follows: En Thayalan contended that there was a confused state of affairs as to the mode, procedure and time frame to be followed in the filing of the memorandum of appeal due to contradictory provisions in the SCR and RHC as well as conflicting court decisions, at the High Court level as well as at the Court of Appeal in the interpretation of the alleged contradictory rules.

Encik Thayalan was of the view that subsequent to the insertion of the new r 3A to O 49 by PU (A) 67/88 (which came into force on 1 January 1991), and taking into consideration O 55 r 2 of the RHC, two line of authorities developed as to the time frame for the filing of the memorandum of appeal, one line of authority saying the time frame to be observed being six weeks, whilst another line of authority saying it is 14 days. In this situation he submitted that the appellant counsel's initial action of incorporating the memorandum of appeal into the appeal record, and filing it within a time frame of six weeks from receipt of the Form 141 notice in following one line of authority was therefore excusable. The appellants' counsel relied on the following authorities in support of this contention, ie the Court of Appeal's decision in *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 and *Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd* [1999] 1 CLJ 337, the High Court decision of *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170, *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217 as well as the case of *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42. The court's attention was also drawn to an article on 'Appeal from Subordinate Courts' [1993] 2 MLJ i at p iv by A Nadarajan.

Encik Thayalan informed the court that it was only in October 1998 that Mr Chew Sien Chee discovered a Court of Appeal decision which ruled that a memorandum of appeal did not form part of the appeal record but must be filed separately from the appeal record and that he took immediate steps to file a separate memorandum of appeal, ie on 8 October 1998, and duly served the same on the respondent's counsel on the same date.

It was the appellant counsel's submission that the respondent has not been prejudiced by the delay that had occurred as the judgment sum had already been paid to the respondent's solicitors as stakeholder. His further submission was that the respondent had not been prejudiced by reason of the fact that they had already been put to notice of the grounds of the

A appellants' appeal way back on 21 May 1998 by reason of its inclusion in the appeal record filed in the first instance. He concluded his submission by arguing that the appellants have a good case on merits as the sessions court judge had failed to take into consideration relevant facts in making the decision that she did.

B En Shanmugam, counsel for the respondent, took issue that there was a confused state of affairs as to the mode and time frame to be observed in the filing of a memorandum of appeal after a full trial. The court's attention was drawn to the fact that all of the cases relied on by the appellants' counsel in support of the proposition of the alleged confused state of affairs do not relate to an appeal after a full trial but in respect of C appeals on an interlocutory application. The cases relied on by the appellants' counsel all relate to the effect of the new O 49 r 6 of the SCR, introduced by PU (A) 193/93 (which came into force on 1 August 1993) which applies to a decision in court, other than a decision after trial, which provision is therefore inapplicable to this appeal which is an appeal after a full trial.

D Encik Shanmugam submitted that as far as an appeal after a full trial is concerned, the clear unambiguous mandatory provisions of O 55 r 2 and r 4(3) of the RHC applies. Order 55 r 2(1), which was amended vide PU (A) 462/90 (which amendment came into force on 1 January 1991) provides:

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> The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49 rule 2 sub-r (4) or rule 3 sub-r (2) of the Subordinate Court Rules 1980 (as the case may be) file in the High Court in duplicate a memorandum of appeal in Form 113A.

F Order 55 r 2(2) requires the appellants to serve a copy of the same on the respondent at the same time. The appellants are also required to pay the prescribed fees payable in respect of filing of a memorandum of appeal.

It was therefore En Shanmugam's submission that there was neither inconsistency nor ambiguity in the rules applicable in this appeal. The present state of affairs was clearly attributable to a mistake on the part of the G appellants' counsel in the interpretation of the rules, the true reason for the delay in the filing of the memorandum of appeal, which cannot constitute sufficient grounds for extension of time. The cases of *Manickam v Tremelbye (Selangor) Rubber Co Ltd* [1949] MLJ 90 and *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161, was submitted as authorities on this point.

H As to the memorandum of appeal in the record of appeal filed on 21 May 1998, En Shanmugam was of the view no reliance can be placed on this by the appellants by reason of the admitted fact of non-payment of the prescribed filing fee. In conclusion he submitted on the facts of this appeal, it was only on 8 October 1998 (ie six months after Form 141 was served) that the appellants filed their memorandum of appeal well out of the time I frame prescribed by the rules. In these circumstances the respondent's counsel prayed that the appellants' application for extension of time, as well as the appeal, be dismissed with costs.

Findings

The date of receipt of the Form 141 notice issued by the sessions court by the appellants' counsel was 9 April 1998. This was therefore the date which marks the time from which the statutory limits for various consequential procedural actions were to be computed.

The next question that the court must answer is whether the appellants' counsel was right in arriving at the conclusion that there were contradictory rules and a confused state of affairs relating to the mode and time frame in the filing of a memorandum of appeal after a full trial.

On this issue, upon careful consideration of the rules referred to, the authorities cited by counsel for the appellants as well as the respondent, I am of the view that the appellants' counsel was clearly wrong in arriving at such a conclusion. I hold that there are no conflicting provisions in the RHC and SCR as to the mode and the time frame for the filing of a memorandum of appeal after a full trial. On the contrary I am of the view that the mode and time frame to be observed as provided by RHC is crystal clear, unambiguous and is open to only one interpretation, and that is, that as submitted by the respondent's counsel. The rule to be observed in an appeal after a full trial is O 55 r 2 RHC (as amended by PU (A) 462/90 which came into force on 1 January 91) and O 55 r 4(3) which is within 14 days from the date of service of the Form 141 notice. I further hold that the appellants' counsel erred in relying, inter alia, on the Court of Appeal decision of *Yupaporn* and *Kwong Yik Bank Bhd* as being relevant in the circumstances of this appeal. I am in agreement with the submission of counsel for the respondent that the confusion that exists is confined to interlocutory appeals and not to an appeal after a full trial. The delay that had led to the late filing of the memorandum of appeal is clearly attributable to a mistake or oversight on the part of the appellants' counsel himself.

I now ask myself the next question. What approach should this court take in respect of this procedural irregularity? The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or rule is to consider whether the requirement that was not complied with should be categorized as mandatory or directory.

The appellants' counsel had submitted that there has been no prejudice to the respondent because the respondent had already been put to notice of the grounds of appeal by reason of the fact that the terms of the memorandum of appeal filed out of time was in the same terms as that earlier included in the record of appeal and that a genuine mistake on the part of the appellants' counsel should not bring about the draconian consequence of depriving the appellants from having this appeal being argued on its merits and was a good ground enabling the court its power to extend time.

In making a decision on this issue this court notes the original rule O 55 r 2(1) RHC reads as follows:

> (1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order 49, rule 3 sub-rule (2) of the

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> Subordinate Court Rules 1980 *or within such extended time as the Court may allow*, file in the High Court in duplicate a memorandum of appeal in Form 113A. (Emphasis added.)

Effective 1 January 1991, subsequent to its amendment vide PU(A) 462/90, O 55 r 2(1) now reads as follows:

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> (1) The appellant *shall*, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A. (Emphasis added.)

C The Rules Committee has in its wisdom removed the enabling power of the court to extend time in this rule. By removing this express enabling power of the court to extend time this must necessarily be construed by this court to mean that this time frame of 14 days prescribed is mandatory and has to be strictly complied with. The failure to comply with this procedural requirement against the factual circumstances of non-compliance, which is D admitted in this case, means that non-compliance was incapable of being waived and the appeal is therefore liable to be dismissed by this court.

Further, in the exercise of its discretionary power, it has been authoritatively laid down that ignorance of procedural law does not constitute sufficient material upon which the court could exercise its discretion to enlarge time where an appellant has failed to file it within the E time prescribed by the rules (see Supreme Court decision in *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 109).

It is also necessary to show special circumstances to enable the court to exercise its discretion. It is not enough to show that the appeal had merits.

F As to what constitute 'special' grounds, in the case of *Cheah Teong Tat v Ho Gee Seng & Ors* [1974] 1 MLJ 31 Syed Agil Barakbah J (as his Lordship then was), in facing a similar question, besides holding that the mere fact of misunderstanding of the rules is not a special circumstance as to induce the court to give leave to extend time, also gave some instances which could be considered as 'special' circumstances in the granting of an G extension of time, ie where the applicant 'has been misled by the other side, or where some mistake has been made in the registry itself and he was misled by an officer of the court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay'.

H In these circumstances the application for extension of time of the appellants is dismissed with costs.

Application dismissed.

Reported by Wong Siok Chin

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